WILDERNESS WATCH
OREGON NATURAL RESOURCES COUNCIL, ET AL.

IBLA 94-842, 94-903 Decided January 30, 1998

Appeals from a Decision Record/Finding of No Significant Impact of the Area Manager, Andrews Resource Area, Oregon, Bureau of Land Management, approving construction of a temporary fence between grazing allotments in a wilderness study area. OR-026-93-48.

Affirmed.

1. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Wilderness--Grazing and Grazing Lands--National Environmental Policy Act of 1969: Environmental Statements

   The BLM's approval of construction of a temporary fence between grazing allotments within a wilderness study area is not in violation of section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (1994), where BLM adequately considers the environmental impacts of such activity and all appropriate alternatives.

2. Federal Land Policy and Management Act of 1976: Wilderness--Grazing and Grazing Lands

   The BLM's approval of construction of a temporary fence between grazing allotments within a wilderness study area violates neither the nonimpairment mandate of section 603(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1994), nor applicable BLM policy, where BLM properly determines that the fence will protect and enhance the wilderness values of that area.

APPEARANCES: Joseph F. Higgins, Chairman, Pacific Northwest Chapter, Wilderness Watch, Portland, Oregon, for Wilderness Watch; Mark Hubbard, Esq., Oregon Natural Resources Council, Eugene, Oregon, for Oregon Natural Resources Council, et al.; Ed Davis, Tom J. Davis Livestock, Inc., Princeton, Oregon, for Intervenor Tom J. Davis Livestock, Inc.; Donald P. Lawton, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Wilderness Watch (WW) (IBLA 94-842) and the Oregon Natural Resources Council, Oregon Natural Desert Association, and Sierra Club, Oregon Chapter (ONRC, collectively) (IBLA 94-903) have appealed from a Decision Record (DR)/Finding of No Significant Impact (FONSI) of the Area Manager, Andrews Resource Area, Oregon, Bureau of Land Management (BLM), dated August 24, 1994, approving construction of the Whiskey Hill Fence on public lands. The fence is located within the Alvord Peak wilderness study area (WSA) (No. OR-2-83), which is being considered by Congress for designation as a wilderness area, pursuant to the Wilderness Act, as amended, 16 U.S.C. §§ 1131-1136 (1994).

By Order dated November 2, 1994, the Board granted WW's request to stay the effect of the Area Manager's August 1994 DR/FONSI, pending the disposition of its appeal. Subsequently, in response to BLM's request, we consolidated the two appeals by Order of March 30, 1995. Tom J. Davis Livestock, Inc. (TJD), the permittee for the Carlson Creek Allotment, seeks to intervene in this proceeding because of its interest in the fence. That request is granted.

The DR/FONSI was based on an Environmental Assessment (EA) (No. OR-026-93-48), which considered the environmental consequences of constructing the fence and alternatives thereto. In the FONSI, the Area Manager concluded that, given certain mitigating measures, no significant environmental impacts would result from construction of the fence; thus, BLM was not required to prepare an environmental impact statement (EIS), pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994).

The approved fence is part of a 1.7-mile-long, 3-strand, barbed wire fence which would run on the west side of the ridge forming the boundary between the Carlson Creek and South Steens grazing allotments. About 0.7 of a mile of the fence is on public land, the remainder is on private land. The need for the fence is explained by BLM as follows:

> The fence is needed to maintain the integrity of different grazing management systems on two separate allotments. The Carlson Creek Allotment is being managed under an early season of use with cattle being removed in time for regrowth of riparian

> vegetation. The riparian areas in the Carlson Creek Basin are improving under this grazing system. The upland areas in the Skull Lake Pasture of the South Steens Allotment are being used in the late summer for 2 years and in the spring for 2 years, on a rotation basis. Cattle from the Skull Lake Pasture are drawn to the water and green forage in the riparian areas of the Carlson Creek Basin during the summer. They follow known cattle trails over the Alvord Peak ridgeline and drop down into the Basin, grazing the area being rested. The late season unauthorized grazing is slowing recovery of the Carlson Creek riparian areas. When the Skull Lake Pasture is grazed in the spring, cattle from both allotments mix, causing problems for both ranchers.

(BLM Response at 2.)

Moreover, BLM asserts that the fence would require only a minimum disturbance of soils and vegetation:

> Steel posts would be pounded into the ground, each post creating a hole 1½-inch in diameter. No vegetation would be cleared or even trimmed. No soil would need to be disturbed. Rock cribs (rocks in a wire basket) would be placed on top of the ground to create stretch panels and end braces. Rock cribs can be easily removed at any time. Materials would be carried to the site on horseback.

Id.

In his DR/FONSI, the Area Manager concluded that the fence was necessary to keep cattle on the two allotments from mixing and thus maintain and improve the health of the plant communities and increase the diversity of plant species on each of the allotments, especially in the riparian areas of the Carlson Creek Allotment. He also concluded that the fence did not conflict with the wilderness values of the public lands, but rather was necessary for their preservation:

> [The fence] will allow overall allotment management objectives to be accomplished through proper management of grazing. One of these important objectives is improvement of wilderness ecological values. The fence will be evaluated annually for the first two years to determine if it is helping to meet the objectives for grazing management on the Carlson Creek and South Steens Allotments. At the time of wilderness designation, the fence will be evaluated to determine if it is compatible with wilderness values.
>
> The temporary fence does not violate BLM's interim management WSA guidelines. Exception 4 to the general rule for Interim Management of WSAs as outlined in Instruction Memorandum (IM)

> No. OR-94-023[, dated November 9, 1993,] states, "the only activities permissible in WSAs are temporary uses that create no new surface disturbance nor involve [the] permanent placement of structures[,]" or "activities that clearly protect or enhance the land's wilderness values" or that "provide the minimum necessary facilities for public enjoyment of the wilderness values." The temporary fence is the minimum necessary to protect ecological values associated with the Alvord Peak [WSA].

(DR/FONSI at 1.)

In its Statement of Reasons (SOR), ONRC asserts that BLM's approval of the fence will prejudice BLM's upcoming decision regarding adoption of an allotment management plan (AMP) for the South Steens Allotment, since BLM will be inclined not to choose a "no grazing" alternative, because the existence of the fence presupposes some grazing use. The ONRC argues that this violates 40 C.F.R. § 1506.1, because it will, at the time of the AMP decision, "limit the choice of reasonable alternatives" to adoption of an AMP. (SOR at 2.)

[1] Regulation 40 C.F.R. § 1506.1 provides that no action concerning a proposed Federal action should occur while the proposal is under consideration in an EIS (or EA) when that action will either have an adverse environmental impact or limit the choice of reasonable alternatives to the proposal. The proposal at issue here is construction of the fence, not adoption of an AMP. Thus, taking action regarding the proposed fence is not violative of 40 C.F.R. § 1506.1 as it pertains to the separate and distinct AMP proposal. See Southern Utah Wilderness Alliance, 141 IBLA 85, 89 (1997).

Contrary to ONRC's argument, we do not consider construction of the fence and adoption of an AMP as connected actions which must be considered together in a single EIS or EA. (SOR at 2.) Regulation 40 C.F.R. § 1508.25(a)(1) provides that actions are deemed "connected," and thus should be considered in a single EIS or EA, "if they: (i) Automatically trigger other actions * * * [;] (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously[; or] (iii) Are interdependent parts of a larger action and depend on the larger action for their justification." The concern evident in the regulation is to avoid segmenting interrelated projects such that cumulatively significant environmental impacts are overlooked or, worse, deliberately ignored, in violation of section 102(2)(C) of NEPA. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 298 (D.C. Cir. 1987). The ONRC provides no argument or evidence in support of the assertion that the fence and AMP are connected actions. Nor, in any case, do we find that to be the case. Construction of the fence does not automatically trigger adoption of an AMP, or vice versa. Nor is either action dependent on the other. The BLM may approve the fence regardless of whether an AMP for managing grazing use

within the South Steens Allotment is ever adopted, since the fence will affect the distribution of cattle between the two allotments and an AMP would affect the distribution of cattle only within the South Steens Allotment. Likewise, BLM may adopt an AMP regardless of whether the fence is ever constructed. Further, while the fence may assist in the achievement of AMP objectives in the South Steens Allotment by keeping out Carlson Creek Allotment cattle, the fence and AMP are not interdependent parts of any larger action. Rather, each has its own utility and purpose.

Moreover, ONRC has not identified, and we cannot discern any cumulatively significant environmental impact that might be overlooked or ignored by separately assessing the impacts of constructing the fence and adopting an AMP. We therefore conclude that BLM did not violate 40 C.F.R. § 1508.25(a)(1) by considering the fence and AMP in two separate environmental review documents.

Next, ONRC argues that BLM failed to consider an adequate range of alternatives to the proposed action, thus violating 40 C.F.R. § 1502.14. (SOR at 4.) It asserts that BLM should have considered precluding grazing in the South Steens Allotment because "a 'no grazing' alternative would best protect the Carlson Creek riparian area[s] from cattle trespassing from South Steens Allotment and would not require the construction of a fence in the WSA." Id.

The BLM is required by NEPA to consider reasonable alternatives to a proposed action, which will accomplish its intended purpose and yet have a lesser or no impact. See 40 C.F.R. §§ 1501.2, 1502.14, and 1508.9; Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 815 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 332 (1989). This ensures that the BLM decisionmaker "has before him and takes into proper account all possible approaches to a particular project." Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971) (emphasis added). Among such alternatives is the no action alternative. Here, BLM considered the alternative of not constructing the fence, but engaging in increased herding to keep cattle on the respective allotments. See EA at 4, Alternative 5.

Having concluded that the analysis of the environmental impacts of construction of a cattle fence was not an improper segmentation of a larger proposal, we find that BLM did not err in failing to consider the alternative of not permitting grazing on either allotment, since that would not accomplish the purpose intended to be served by the proposed action, i.e., preventing cattle on each allotment from grazing on the other allotment. See Howard B. Keck, Jr., 124 IBLA 44, 53-54 (1992). Such an alternative is only properly considered in the context of deciding whether to modify the controlling management framework plan.

Both WW and ONRC contend that the Area Manager's August 1994 DR/FONSI to approve construction of the fence violates the requirements of section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1994), and BLM's policy on the management of WSA's, as set forth in the Interim Management Policy and Guidelines for Lands under Wilderness Review (IMP) and in IM No. OR-94-023.

Furthermore, WW asserts that the Area Manager, in his DR/FONSI, failed to provide the "determination," required by the IMP, "that the project complies with the [IMP]." (SOR at 1.)

[2] All of the lands at issue here are within the Alvord Peak WSA, which is being reviewed by Congress for possible designation, pursuant to the Wilderness Act, as part of a wilderness area. They are therefore subject to the protection of section 603(c) of FLPMA until Congress either designates the lands or releases them from further consideration. See Committee for Idaho's High Desert, 139 IBLA 251, 253 (1997). This means that BLM is required to manage the lands "in a manner so as not to impair the[ir] suitability * * * for preservation as wilderness." 43 U.S.C. § 1782(c) (1994); Nevada Outdoor Recreation Association, 136 IBLA 340, 342 (1996). The BLM's specific management of the lands is governed by the IMP, which sets forth certain nonimpairment criteria. These criteria are designed to ensure that no activity will occur that will jeopardize or negatively affect Congress' ability to find that the WSA has the necessary wilderness characteristics. Committee for Idaho's High Desert, 139 IBLA at 253.

In deciding whether to approve an action proposed within a WSA, the authorized BLM officer must decide whether it will impair the wilderness suitability of the affected lands. 44 Fed. Reg. 72013, 72023 (Dec. 12, 1979). We hold that the Area Manager made that determination here, concluding that construction of the fence complies with the IMP: "The temporary fence does not violate BLM's interim management WSA guidelines." (DR/FONSI at 1.)

Next, WW asserts that the EA failed to provide certain information required by section II-B-3 of the IMP. The WW identifies six areas in which it finds the EA deficient:

- Maintenance schedules and procedures, miles, square feet or acres of soil and vegetation disturbance

- Meaningful description of soils, erosion potential and climate, including precipitation

- Existing recreation uses

- Wilderness characteristics as documented in the intensive inventory report

- Vistas, key viewing areas and visitor use areas

- Written assessment of cumulative impacts.

(SOR at 1.)

Section II-B-3 sets forth certain information "needed to reach conclusions on the nonimpairment criteria" that must be contained in an EA. 44 Fed. Reg. at 72022. Among the information specified are the six areas identified by WW. Id. at 72022-23. We find no error. While some of the areas are not covered in the EA, WW has provided no evidence that the information it cites is necessary to reach a conclusion regarding whether the fence will meet the nonimpairment criteria.

Next, both WW and ONRC contend that the Area Manager's Decision approving construction of the fence violates the IMP and, specifically, IM No. OR-94-023. They first argue that the fence does not qualify as an activity that is generally permissible in a WSA, as provided by the IM, since it is "not really temporary" because it is not intended to be removed when Congress designates the area as wilderness. The ONRC also asserts that the fence will create a surface disturbance: "Placing and removing fence posts disturbs both surface and subsurface resources." (SOR at 6 n.7.) Both Appellants also argue that the fence does not qualify as an exception to the general rule since it will not clearly protect or enhance the wilderness values in the WSA. The WW generally contends that the fence will provide "no important wilderness benefit," but will instead only benefit two grazing permittees while "severely impact[ing] the wilderness values of the WSA." (SOR at 2.) The ONRC also asserts that the fence will adversely affect wilderness values.

In the IMP, BLM set forth three nonimpairment criteria for managing a WSA while the area is under wilderness review. In order to undertake a proposed activity, it must meet all of the criteria or otherwise be considered nonimpairing. See Committee for Idaho's High Desert, 139 IBLA at 255. Such criteria are that the activity is temporary, any impacts are capable of being reclaimed to the condition of being substantially unnoticeable in the WSA as a whole by the time the Secretary of the Interior is scheduled to recommend to the President whether to designate the area as wilderness, and, after termination of the activity and any needed reclamation, the area's wilderness values are not degraded so far, compared with its values for other purposes, as to significantly constrain the Secretary's recommendation. 44 Fed. Reg. at 72018; Dave Paquin, 129 IBLA 76, 80 (1994).

The IMP primarily governs activity proposed to occur prior to the Secretary's recommendation. It is also applicable to activity that will

occur after that recommendation and before Congress acts. Lassen Motorcycle Club, 133 IBLA 104, 106-07 (1995). However, such activity cannot meet the nonimpairment criterion requiring that it be capable of being reclaimed to the point of being substantially unnoticeable by the date of the Secretary's recommendation. Thus, such activity may be permitted only where it will be substantially unnoticeable and also satisfy the other wilderness criteria whenever Congress acts. Id. at 107-08; see IM No. 94-236, dated July 13, 1994, at 1, 2; Handbook (H-8850-1 (Rel. 8-67 (July 5, 1995))) at 9.

In IM No. OR-94-023, the State Director, Oregon, BLM, set forth what is required to satisfy the nonimpairment criteria in the case of a proposed action, where the affected lands are under wilderness review:

> The general rule is that the only activities permissible in WSAs are temporary uses that create no new surface disturbance nor involve [the] permanent placement of structures. Such temporary uses (in effect, "no-trace" activity) may continue until Congress acts, so long as such uses can easily and immediately be terminated at that time [without the need for any subsequent reclamation].

(IM No. OR-94-023, at 2.)

Therefore, an activity will be considered to satisfy the criterion of being "temporary," where it can be easily and immediately removed or terminated whenever Congress designates the WSA as wilderness. However, the State Director also provided that there are certain "exceptions" where the activity need not be immediately removed or terminated when Congress acts, but may continue even after designation. (IM No. OR-94-023, at 2; see Handbook at 9.) In addition, such activity may create a new surface disturbance and involve the permanent placement of structures. These exceptions include what the Area Manager refers to as "Exception 4," which covers "[a]ctivities that clearly protect or enhance the land's wilderness values or that provide the minimum necessary facilities for public enjoyment of the wilderness values." Id. Such activities are considered to be nonimpairing and thus are excepted from the requirement to satisfy the nonimpairment criteria. See Committee for Idaho's High Desert, 139 IBLA at 255.

The State Director cautioned that "[p]rojects that may enhance wilderness values in a portion of the WSA, but are anticipated to create noticeable degradation of natural character to other portions of the WSA should not be approved." (IM No. OR-94-023, at 3.) Thus, even though an excepted activity has a beneficial impact on certain wilderness values, it must also generally satisfy the wilderness criteria, and not adversely affect Congress' ability to designate the whole area as wilderness. See IM No. 94-236, at 1, 2.

In the present case, the Area Manager concluded, in his DR/FONSI, that the fence will "clearly protect [and] enhance the land's wilderness values," i.e., the "ecological values associated with the Alvord Peak [WSA]."

(DR/FONSI (quoting from IM No. OR-94-023, at 2).) He also stated that it would "allow overall allotment management objectives to be accomplished," including the "improvement of wilderness ecological values." Id. The Area Manager, thus, found that the fence was "except[ed]" from the requirement that activity be immediately removed or terminated when Congress designated the WSA as wilderness. (IM No. OR-94-023, at 2.)

However, the Area Manager provided that BLM would evaluate the fence when Congress acted to designate the WSA, in order to determine whether it was "compatible with wilderness values," and thus whether BLM should call for its removal at that time. (DR/FONSI at 1.) If it was determined to be compatible, the fence would remain. If found to be not compatible, it would be removed. We fail to see how this would, in the case of the fence at issue here, have negatively affected Congress' ability to designate the WSA as wilderness.

In any event, during the course of these appeals, BLM has clearly indicated that "the proposed fence will immediately be removed when and if the Congress designates the Alvord Peak WSA as a wilderness." (BLM Answer at 3 (citing November 21, 1994, declaration of Andrews Resource Area Acting Manager).) There is no evidence that BLM will fail to live up to its commitment.

Thus, BLM has now firmly decided that the fence will be "temporary," within the meaning of IM No. OR-94-023. However, we must still consider whether the fence may be excepted from the general rule where it would create a slight surface disturbance and, to this extent, deviate from that rule. See Handbook at 9.

The WW and ONRC contend that the Area Manager erred when he concluded that the fence will clearly protect and enhance the wilderness values of the WSA. The WW notes that the "key benefit[s] * * * are to the riparian values in [the] Carlson Creek drainage which are outside the WSA and to the permittees in that they would not have to do as much herding." (SOR at 1.) This view is shared by ONRC.

The BLM determined that the fence would primarily protect and enhance the health of the plant community and plant diversity in the riparian areas of the Carlson Creek Basin, which are entirely outside the WSA. (EA at 1, 4-5, 7.) This was, aside from the undeniable advantage to the permittees of eliminating the need for herding, clearly its key benefit. However, BLM also found that the fence would protect and enhance the health of the plant community and plant diversity in the upland areas within the WSA, particularly within the Carlson Creek Allotment. The BLM noted in the EA that, as a result of the grazing regime aided by the fence, "[t]he meadows in the headwaters of Carlson Creek should experience reduced erosion and an increase of standing vegetation due to the early season grazing and improved distribution." (EA at 6.) This would be especially significant in the case of the Carlson Creek Allotment since both the riparian and upland areas are, under the adopted grazing system, designed to be rested,

in order to allow regrowth, during much of the year. However, it would also be true in the case of the South Steens Allotment. Clearly, the fence would preclude the flow of cattle between the two allotments, thus eliminating excessive numbers of cattle that might otherwise congregate on either of the allotments at any time, especially when the allotment is being rested. See TJD Request to Intervene at 1.

Furthermore, BLM found that the fence would also eliminate cattle use of the well-established trails across that particular section of ridgeline. The BLM noted that the trails, like the other trails across the more than 9 miles of ridgeline in the WSA, had, as a result of past cattle use, been "denuded of vegetation and [were subject to] accelerated erosion which detract[s] from the naturalness of the area." (Declaration of Andrews Resource Area Acting Manager at 1.) Thus, it concluded that the fence would aid the process of "healing" these high elevation trails, which "take[s] decades," especially given the large numbers of cattle expected to use the allotments. Id. at 1, 2; see EA at 6 ("The fence would limit the movement of cattle across the pass over the ridge and allow [the] effects of trailing * * * in the area to heal"); TJD Request to Intervene at 2.)

The WW and ONRC have provided no evidence to the contrary. At best, ONRC simply asserts that the fence will not limit cattle use of the trails leading across the ridgeline: "[H]abit-forming cattle tend to trail along the fence line in an effort to gain access to the riparian area that the fence is intended to deny them." (SOR at 6 n.7.) This does not overcome BLM's opinion that cattle will cease to use the trails unless they can gain access across the top of the ridge.

We, therefore, conclude that WW and ONRC have failed to carry their burden to establish, by a preponderance of the evidence, that BLM erred in finding that the wilderness values in the WSA would be protected and enhanced by construction of the fence. See Nevada Outdoor Recreation Association, 136 IBLA 340, 344 (1996), and cases cited.

The WW also asserts that BLM incorrectly found that the fence would not adversely impact the wilderness values in the WSA:

> The fence trammels (controls) the WSA and is indisputable evidence that people rather than nature are in control of what is happening in the WSA. One half mile of fence, no matter how carefully constructed, detracts from the natural scenery and causes both wildlife and people to modify their behavior. Barbed wire is not natural; it is controlling (that's why it is used) and interferes with primitive and uncontrolled type of recreation and the sense of solitude.
>
> The 0.5 mile of fence would be evident to the casual observer within the WSA * * *. It would be much more than evident when the recreationist had to crawl over or under it.

(SOR at 2.) The ONRC also raises the question of adverse impacts to WSA wilderness values.

The BLM concluded in the EA that the fence would have only a minimal impact on the WSA wilderness values of naturalness and outstanding opportunities for primitive, unconfined recreation. It noted that the fence would be partially screened by topography and vegetation and fence materials would be colored so as to blend in with the surrounding environment, thus making it not visible throughout much of the WSA. In addition, the fact that it would be located close to the WSA boundary would "limit[] its impacts on people hiking within the area." (EA at 6.)

The WW argues that the fence is a human and not a natural element of the environment, which will affect those (including wildlife and people) who come into immediate contact with it. As to its impact on naturalness, WW proves only that the fence would be substantially noticeable to those in its immediate vicinity. It does not present any evidence that it would be substantially noticeable in the WSA as a whole or any substantial portion thereof. Nor does it attempt to define to what extent the natural scenery of the WSA would be affected. Thus, we are not persuaded that construction of the fence will adversely impact the naturalness of the WSA. See Utah Wilderness Association, 72 IBLA 125, 128 (1983).

Therefore, we conclude that WW and ONRC have failed to sustain their burden to establish, by a preponderance of the evidence, that BLM erred in determining that no wilderness value in the WSA would be degraded or adversely affected in any meaningful way by construction of the fence. We also conclude that the Area Manager properly found that the fence would protect and enhance, rather than degrade, wilderness values in the WSA, and was thus excepted from the general rule that it be immediately removed when Congress designates the area as wilderness and to not create any new surface disturbance.

To the extent Appellants have raised arguments which we have not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

_____
John H. Kelly
Administrative Judge

I concur:

_____
C. Randall Grant, Jr.
Administrative Judge